Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

FRANCES D. PEEPLES,

Petitioner,

v.

WRIGHT INVESTMENT PROPERTIES, INC., HOTEL MANAGEMENT, INC., DRIVING FORCE, L.L.C., MACON, GA. HOTEL PARTNERS, L.P., and STACEY PERRYMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether or not the District Court erred in holding that no genuine issue of material fact existed that Petitioner, who had at least sixteen years experience as a bartender, including several years with her visual disability, was not qualified for this position and thereby failed to establish a *prima facie* case of discrimination under the Americans With Disabilities Act ("ADA").

Whether the fact that petitioner applied for Social Security Disability and was receiving partial payments at the time she was discharged prevents her from bringing a claim under the Americans With Disabilities Act ("ADA").

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Cited Authorities v

Table of Appendices viii

Opinions Below 1

Statement of Jurisdiction 1

Statutory Provisions Involved 2

Statement of the Case 2

A. Background 2

B. The Proceedings Below 3

Reasons for Granting the Writ 5

I. The Petition Should Be Granted Because The Judgment Of The District Court As Affirmed By The Eleventh Circuit Court Of Appeals Wrongly Interprets The Americans With Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* And, In Light Of This Court's Decisions In Sutton Kirkinburg And Murphy, Effectively

Contents

Page

Defeats The Purpose And Intent Of The Law By Equating The Manner In Which A Task Is Performed With The Essential Function Of The Job. 5

II. The Petition Should Be Granted Because The Judgment Of The District Court As Affirmed By The Eleventh Circuit Court Of Appeals Conflicts With The Provisions Of The Americans With Disabilities Act, 42 U.S.C. §§ 12101 *et seq*. And This Court's Decisions Interpreting This Act. 8

A. Petitioner is "Disabled" Under the Provisions of the ADA 9

B. Petitioner Is A Qualified Individual With A Disability For Purposes Of The ADA 12

III. The Petition Should Be Granted Because The Judgment Of The District Court As Affirmed By The Eleventh Circuit Court Of Appeals Conflicts With This Court's Prior Rulings On The Viability Of An ADA Claim Where The Claimant Was Declared Disabled For SSDI Purposes. 14

IV. The Petition Should Be Granted Because The Judgment Of The District Court As Affirmed By The Eleventh Circuit Court Of Appeals

Contents

Page

Conflicts With The Law Pertaining To The Standard To Be Followed For The Grant Of Motions Of Summary Judgment. 16

Conclusion 17

TABLE OF CITED AUTHORITIES

Page

Cases:

Apcoa, Inc. v. Fidelity National Bank, 906 F.2d 610 (11th Cir.1990) 16

Bell v. Cameron Meadows Land Company, 669 F.2d 1278 (1982) 16

Cleveland v. Policy Management Systems Corp., et al., 526 U.S. 795, 119 S. Ct. 1597 (1999) 15

Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667 (7th Cir. 1998) 13

Griesel v. B. D. Hamlin, 963 F.2d 338 (11th Cir. 1992) 16

Howard v. BP Oil Company, Inc., 32 F.3d 520 (11th Cir. (1994) 16

Irby v. Bittick, 44 F.3d 949 (11th Cir. 1995) 8, 16

Joiner v. General Electric Company, 78 F.3d 524 (11th Cir. 1996) 16

Pritchard v. Southern Co. Services, 92 F.3d 1130 (11th Cir. 1996) 9

Sankovich v. Life Ins. Co. of North America, 638 F.2d 136 (1981) 16

Cited Authorities

	Page
Sherrod v. American Airlines, Inc., 132 F.3d 1112 (5th Cir. 1998)	11
Snell v. U.S., 680 F.2d 545 (1982	16
Stewart v. Happy Herman's Cheshire Bridge, Inc., 177 F.3d 1278 (11th Cir. 1997)	9
Witter v. Delta Airlines, Inc., 138 F.3d 1366 (11th Cir. 1998)	9
Statutes:	
28 U.S.C. § 1254(1)	1
42 U.S.C. § 12101, *et seq.*	2, 3, 4, 5, 8, 9
42 U.S.C. § 12102(2)(A)	11
42 U.S.C. § 12102(2)(B)	11
42 U.S.C. § 12102(2)(C)	11
42 U.S.C. § 12111(8)	12
42 U.S.C. § 12112(b)(5)(A)	9
O.C.G.A. § 34-6a-1	4

Cited Authorities

Page

Other Authorities:

29 C.F.R. pt: 1630 12

29 CFR pt. 1630.2(h)(1) 10

29 CFR pt. 1630.2(i) 10

29 CFR pt.1630.2(j)(i)(ii)(iii) 10

29 C.F.R. pt. 1630.2(j)(ii) 10

29 C.F.R. pt. § 1630.2(m) 12

House Education and Labor Report 55 12

Senate Report 26 12

TABLE OF APPENDICES

Page

Appendix A — Order Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed December 9, 1999 ..... 1a

Appendix B — Order And Judgment Of The United States District Court For The Middle District Of Georgia, Macon Division Dated And Filed January 8, 1999 ..... 3a

Appendix C — Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing Dated And Filed February 9, 2000 ..... 11a

Petitioner, Darlene F. Peeples, respectfully requests that a writ of certiorari issue to review the judgment of the United States District Court granting respondent's motion for summary judgment, the judgment, per curiam, issued by the United States Court of Appeals for the Eleventh Circuit affirming the District Court's judgment and the judgment of the United States Court of Appeals for the Eleventh Circuit denying petitioner's Petition for Rehearing En Banc.

OPINIONS BELOW

The Judgment of the United States Court of Appeals for the Eleventh Circuit affirming the District Court's grant of Summary Judgment was entered per curiam on December 9, 1999, and is unpublished. (App. A).

The Order of the United States District Court for the Middle District of Georgia, Macon Division, granting Respondents' Motion for Summary Judgment filed January 8, 1999 is unpublished. (App. B).

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Eleventh Circuit denied a timely filed petition for rehearing en banc on February 9, 2000. (App. C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pursuant to The American With Disabilities Act of 1990 ("ADA") 42 U.S.C. § 12101, *et seq.* a *prima facie* case of discrimination is established by showing that (1) Plaintiff has a disability; (2) is a qualified individual; and (3) was discriminated against because of the disability.

STATEMENT OF THE CASE

The issue in this case is whether or not the petitioner is a qualified individual with a disability for purposes of the Americans With Disabilities Act. The case of Ms. Peeples presents the flip side of three Supreme Court cases decided near the end of the 1998-1999 Term, Sutton, Kirkinburg and Murphy. While these cases established guidelines limiting the circumstances under which a person can claim to be "disabled" for purposes of the ADA, the case of Ms. Peeples involves the issue of to what extent a disabled person can be qualified to perform the essential functions of a job. This case arises from the grant of respondents' motion for summary judgment by the U.S. District Court for the Middle District of Georgia primarily on the grounds that petitioner is not qualified to perform the essential functions of the job of bartender from which she was discharged. To fully appreciate the significance of the issues presented by this case, it is necessary to consider its background as well as the proceedings and arguments presented below.

A. Background

Petitioner was discharged from her position as bartender because of her disability, a permanent visual impairment known as histoplasmosis. Petitioner had competently

performed her duties in this position with her previous employer(s) for approximately sixteen years, the last five of which she performed with her present disability, using accommodations that both she and her former employer provided, without any complaints or problems. However, a short time after her previous employer sold its business to respondents, she was discharged when the new owners learned of her disability. Although there had been no problems with her job performance and her visual acuity was never adequately tested by respondents, she was summarily discharged because of her visual impairment.

Notwithstanding expert testimony to the contrary and the fact that petitioner was competently and satisfactorily performing her duties as bartender, the District Court determined that she was not qualified to perform the essential functions of the position of bartender and granted respondents' motion for summary judgment.

The court also alluded to the fact that because petitioner had applied for Social Security Disability and was receiving partial benefits she could not then claim that she could perform the essential functions of the job of bartender and therefore was not a qualified individual with a disability for purposes of the Americans With Disabilities Act.

B. The Proceedings Below

On February 27, 1997, petitioner, Frances Darlene Peeples ("Petitioner") filed suit against Wright Investment Properties, Inc., Hotel Management, Inc., Driving Force, L. L. C., Macon, Georgia, Hotel Partners, L. P., and Stacey Perryman (hereinafter "the respondents"), alleging violations of the Americans With Disabilities Act, 42 U.S.C. §§ 12101

et seq. ("ADA") and the Georgia Equal Employment For Persons With Disabilities Code, O.C.G.A. § 34-6a-1, ("GEEPDC") as the result of being discriminated against and wrongfully terminated from her employment because of her disability. Petitioner also sought recovery for intentional and negligent infliction of emotional distress. Upon completion of discovery, a motion for summary judgment was filed on behalf of the employers on July 30, 1998, which alleged, *inter alia*, that petitioner was not a "qualified individual with a disability" under the "ADA". Following oral argument the District Court entered an order on January 8, 1999, granting summary judgment for the employers and dismissing petitioner's case, holding that no genuine issues of material fact existed that petitioner could not perform the essential functions of the position of bartender and therefore she could not establish a *prima facie* case of discrimination under the ADA. (R-70). Consequently, the court also dismissed the GEEPDC claim and claims for emotional distress. (App. B). Following the grant of summary judgment, Petitioner filed a Notice of Appeal on February 8, 1999. The United States Court of Appeals for the Eleventh Circuit heard oral argument on respondents' motion on November 30, 1999, and entered an order, per curiam, on December 9, 1999, affirming the District Court's judgment (App. A). Petitioner timely filed a petition for Rehearing En Banc which was denied by the Court of Appeals on February 9, 2000 (App. C).

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE JUDGMENT OF THE DISTRICT COURT AS AFFIRMED BY THE ELEVENTH CIRCUIT COURT OF APPEALS WRONGLY INTERPRETS THE AMERICANS WITH DISABILITIES ACT, 42 U.S.C. §§ 12101 *et seq.* AND, IN LIGHT OF THIS COURT'S DECISIONS IN SUTTON KIRKINBURG AND MURPHY, EFFECTIVELY DEFEATS THE PURPOSE AND INTENT OF THE LAW BY EQUATING THE MANNER IN WHICH A TASK IS PERFORMED WITH THE ESSENTIAL FUNCTION OF THE JOB.

This Court interpreted the American with Disabilities Act so as to significantly limit the number of people who can claim to be qualified persons with disabilities under Tile I of the Act. In the cases of Sutton, Kirkinburg and Murphy, this Court found that moderate and prevalent conditions such as correctable vision and hypertension do not qualify as disabilities under the American with Disabilities Act.

Ms. Peeples' case presents the flip side of the question when an individual has a condition that is not moderate or prevalent. Can an employer arbitrarily change what constitutes the essential functions of a particular job or insist upon the functions being performed in a particular way without a dialogue on reasonable accommodations, thereby automatically disqualifying someone who has a disability? More specifically, at the very least does this not present a question for determination by a jury when an individual has competently performed a job for sixteen years and upon learning that the employee is legally blind, new management

automatically assumes that she cannot perform the essential functions of the position because she does not do some things as other individuals?

Permitting summary judgment to stand in this case would seriously frustrate, if not totally defeat, the purpose of the ADA. On the one hand, this Court's decisions have rightly determined that individuals with moderate conditions that can be corrected by medication or other means are not qualified individuals with disabilities for purposes of the ADA because their disabilities are not serious enough to substantially limit one or more of the major life activities of such individual. However, based upon the judgment of the District Court, if someone truly has a disability that limits one or more of the major life activities of such individual, an employer could claim that a particular function must be performed in a way that the disabled person was incapable of doing. In this way the employer could easily circumvent the requirements of the ADA by simply declaring that the individual was not qualified for the position. Thus, Title I of the ADA would become a nullity as persons with disabling conditions attempt to hold onto their jobs by navigating between the Scylla of not being disabled on the one hand, and the Charybdis of not being qualified because they are disabled on the other.

According to the regulations, what the statute requires is not a mere assumption that a person with a severe visual impairment cannot enforce an Alcohol Management Policy, but an open, fact-based dialogue as to whether the individual can enforce the policy (an essential function of bartender) with or without reasonable accommodations. The District Court made the same erroneous assumption that the employer/respondent made, i.e., a person with a severe visual

disability cannot possibly enforce the Alcohol Management Policy. They mistakenly assumed that she cannot see people sharing drinks — her distance vision being limited — and that she cannot observe alterations on driver's licenses since her near vision is poor.

This assumption is totally wrong. First, the lounge where she was working when she was terminated features music from a former era which attracts middle-aged or older persons and very few, if any, young people. Secondly, if there is an issue regarding her ability to observe drink sharing, she can overcome her distance vision problem, as she has often done, by approaching the table of any younger person(s) who may have entered the bar. Finally, she can and has overcome her near vision problem with a magnifier that she, herself, provided. Further, there are many types of relatively inexpensive equipment available to enhance both near and distance vision (e.g., compact high-powered electronic magnifiers, closed circuit television monitors etc.) should a younger — looking person choose this particular bar in which to order a drink. The new management of the hotel did not contemplate or even permit discussion of these possible accommodations and the District Court failed to consider them as well. Notwithstanding the fact that she had competently performed the essential functions of bartender for approximately sixteen years (five with her disability), respondents merely assumed that petitioner was not qualified to stand behind a bar and perform all of the essential functions of the job with her naked eye, the way bartenders without a disability accomplish these tasks.

If petitioner's vision could be corrected, by whatever means, to that of persons with normal or near normal vision, she would, of course, not be disabled within the meaning of

the ADA. This is the teaching of Sutton, Kirkinburg and Murphy. However, the Court should not allow respondents to require that the essential functions that were competently and satisfactorily performed by petitioner in one way before they realized that she had a disability be performed in a way that she is incapable of after they realized that she had the disability. The error here is in equating the **manner** in which the essential function is performed with the **essential** function itself. Management should be required to accommodate the manner in which an essential function is performed, if reasonably possible. Otherwise, disabled persons who are confronted with unfounded assumptions about their inability to perform a job will not be permitted to work and the ADA will mean nothing.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE JUDGMENT OF THE DISTRICT COURT AS AFFIRMED BY THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT, 42 U.S.C. §§ 12101 *et seq.* AND THIS COURT'S DECISIONS INTERPRETING THIS ACT.

The District Court erred in granting summary judgment in favor of the respondents because there are undisputed facts from which different inferences might be drawn and as to which reasonable minds might differ. *Irby v. Bittick*, 44 F.3d 949 (11th Cir. 1995). In granting summary judgment in the case at bar the District Court erroneously held that no genuine issue of material fact existed that Petitioner was not a "qualified individual with a disability". In reaching this decision the District Court not only overlooked numerous portions of the record, including but not limited to,

petitioner's own testimony as well as that of several experts which strongly supports petitioner's position, but apparently chose to make its own assumptions totally unsupported by the record.

A *prima facie* case of discrimination under the American With Disabilities Act of 1990 ("ADA") 42 U.S.C. § 12101, *et seq.* is established by showing that (1) Plaintiff has a disability; (2) is a qualified individual; and (3) was discriminated against because of the disability. *Pritchard v. Southern Co. Services*, 92 F.3d 1130 (11th Cir. 1996); *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 177 F.3d 1278 (11th Cir. 1997); *Witter v. Delta Airlines, Inc.*, 138 F.3d 1366 (11th Cir. 1998).

First, petitioner is "disabled" for purposes of the ADA as shown by the reports and depositions of her treating physician and other experts. Second, she is able to perform the essential functions of a bartender. Third, she was discriminated against **because of her disability.** In addition, the position of banquet server is not a comparable position to that of bartender as alleged. The employers' offer to transfer petitioner to this position does not constitute a reasonable accommodation and is in direct violation of the provisions of the ADA. 42 U.S.C. § 12112(b)(5)(A).

A. Petitioner is "Disabled" Under the Provisions of the ADA

The ADA defines "disability" as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) having a record of such impairment; or

(C) being regarded as having such an impairment.
42 U.S.C. § 12102(2).

Under the EEOC regulations "physical impairment" means any physiological disorder or condition cosmetic, disfigurement, or anatomical loss affecting one or more systems of the body. 29 CFR pt. 1630.2(h)(1).

"Substantially limits" is defined as ". . . significantly restricted as to the condition, manner or duration under which an individual can perform a particular 'major life activity' as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. pt. 1630.2 (j)(ii).

The following factors should be considered in determining whether an individual is substantially limited in a major life activity: the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long term impact or the expected permanent or long term impact of or resulting from the impairment. 29 CFR pt.1630.2(j)(i)(ii)(iii).

A "major life activity" is a function such as caring for oneself, performing manual tasks, walking, *seeing*, hearing, speaking, breathing, learning and working. 29 CFR pt. 1630.2(i) (emphasis added).

In the case at bar, petitioner suffers from a condition known as ocular histoplasmosis which adversely affects her vision (D'Heurle Dep. p. 16). This condition is permanent

in nature and reduces her "best" visual acuity to 20/200 which renders her legally blind. (D'Heurle Dep. pp. 56, 62, and 67). This is a physical impairment that substantially limits the major life activity of *seeing*. Therefore, petitioner is a "qualified individual with a disability" for purposes of the ADA under § 12102(2)(A). In addition, petitioner has a record of this impairment and Perryman regarded her as being "legally blind". (Petitioner Dep. p. 60); (*Also see* Separation Notice).

Petitioner's disability also falls under the definition at § 12102(2)(B). It is undisputed that she has a record of visual impairment dating back sometime prior to July 1992, when she was first examined by Dr. D'Heurle. (D'Heurle Dep. at 15).

However, assuming for the sake of argument that petitioner's disability does not fall within the definitions of §§ 12102(2)(A) or 12102(2)(B), which is hereby expressly denied, she would still be considered a "qualified individual with a disability" for purposes of the ADA under § 12102(2)(C). *See Sherrod v. American Airlines, Inc.*, 132 F.3d 1112 (5th Cir. 1998). It is undisputed that Perryman knew of petitioner's visual impairment before she was terminated (Petitioner Dep. pp. 57-60). In fact, when Perryman learned of her disability, she removed petitioner from her position as bartender. (Perryman Dep. pp. 54, 55). Perryman's reason for her actions was that *she did not think* petitioner could perform the functions of a bartender due to her visual impairment and that her disability posed a risk of liability for Holiday Inn. (Perryman Dep. pp. 80, 97). Thus, having shown that Perryman regarded or perceived petitioner as having a disability, she has a "qualified " disability under the definition of § 12102(2)(C).

B. Petitioner Is A Qualified Individual With A Disability For Purposes Of The ADA

The assessment of whether an individual with a disability is qualified for purposes of the ADA should be based on the capabilities of the individual with a disability at the time of the employment decision. 29 C.F.R. pt. 1630 App. § 1630.2(m); *see also* Senate Report at 26; House Education and Labor Report at 55.

Under the provisions of the ADA a qualified individual with a disability is one who, with or without reasonable accommodation, can perform the essential functions of a job. 42 U.S.C. § 12111(8).

Essential functions focus on the purpose of the function and result, rather than the manner in which it is performed. (Horton expert report p.2); (The Job Placement — ADA Connection"; "ADA Essential Function Identification, A Definitive Application of Title I," 1993).

The essential functions of the job of bartender were determined by the job analysis performed by Debra J. Horton, Med., CRC on June 1, 1998. These essential functions were determined to be as follows: (1) Remove bar brands of liquor from cabinet, set up in well; (2) Count money in "bank" to verify, open register; (3) Place beer in ice; (4) Greet customers, check ID's when deemed necessary; (5) Take drink or food orders from customer; (6) Prepare drinks, relay food orders to kitchen, serve customers; (7) Take payment, make change for food and drink orders; (8) Clean bar, tables, ashtrays, bar glasses, bar area; (9) Make judgment call on sobriety of customers, call cab, arrange for ride or offer hotel room for night if deemed necessary; and (10) Count money,

close register, drop money in vault inside hotel. (Horton expert report p. 5).

In ADA cases such as the case here, involving *actual* disabilities as opposed to perceived disabilities or a history of a disability, it is usually true that the plaintiff cannot perform the essential functions of the job without some kind of reasonable accommodation. *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667 (7th Cir. 1998) (emphasis added). Like the plaintiffs in *Dalton, supra*, petitioner does not claim that she could perform all of the essential functions of the job without *any* accommodation. However, she is able to perform all of the essential functions as well as the marginal functions of her job with the accommodation provided by the former owners (two directional lights directly over the cash register behind the bar) and the use of a hand-held magnifier provided by petitioner, herself. (Roberts Affidavit, p. 4).

Contrary to the findings of the District Court, petitioner was and is able to perform all of the functions proposed by the respondents including the proper administration of the hotel's Alcohol Management Program which was not significantly different, if at all from the former owner's Alcohol Management Program. At best, Perryman only performed a cursory examination of petitioner's near visual acuity, i.e. she had her identify several denominations of paper money, identify different types of coins, read some type of document which had nothing to do with her position as bartender, etc. The petitioner passed all of these "tests" without any problem. At no time did anyone attempt to test petitioner's distant visual acuity. It was not until after the fact, i.e., after suit was filed that respondents contended that petitioner's distance visual acuity was too poor for her to

perform her duties as bartender. There was absolutely no evidence proffered by the respondents to support this contention. On the contrary, petitioner demonstrated that she could perform the essential functions as well as the marginal functions of the job of bartender. (*See* Horton Expert Report p. 5)

Further, the trial court misconstrued petitioner's statements in her deposition pertaining to her ability to see at a distance. Petitioner stated that she had difficulty reading the *smaller letters* found on the eye chart at a distance of twenty feet, *not* that she had trouble seeing larger objects. (Petitioner Dep. p. 18).

Although petitioner suffers from a permanent disability, she was and still is capable of performing the essential functions and tasks of a bartender.

III. THE PETITION SHOULD BE GRANTED BECAUSE THE JUDGMENT OF THE DISTRICT COURT AS AFFIRMED BY THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE VIABILITY OF AN ADA CLAIM WHERE THE CLAIMANT WAS DECLARED DISABLED FOR SSDI PURPOSES.

The ADA defines a "qualified individual" to include a disabled person who ". . . can perform the essential functions" of her job "*with or without reasonable accommodation.*"

On the other hand, when the SSA determines whether an individual is disabled for SSDI purposes, it does *not* take

the possibility of "reasonable accommodation" into account nor need an applicant refer to the possibility of reasonable accommodation when she applies for SSDI. Consequently, an ADA suit claiming that the plaintiff can perform her job *with* reasonable accommodation may well prove consistent with an SSDI claim that the plaintiff could not perform her own job (or other jobs) *without* it. *Cleveland v. Policy Management Systems Corp., et al.*, 526 U.S. 795, 119 S. Ct. 1597 (1999). Further, the SSA sometimes grants SSDI benefits to individuals who not only can work, but are working. *Id.* 526 U.S. at 805.

In the case at bar the petitioner was competently and satisfactorily performing her duties as a bartender but was limited in the number of hours she was allowed to work while receiving partial SSDI benefits.

Due to the fact that petitioner's employment was terminated because of her disability, notwithstanding the fact that she was able to perform the essential functions of bartender with accommodations provided by herself and her former employer(s), respondents unlawfully discriminated against her.

IV. THE PETITION SHOULD BE GRANTED BECAUSE THE JUDGMENT OF THE DISTRICT COURT AS AFFIRMED BY THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE LAW PERTAINING TO THE STANDARD TO BE FOLLOWED FOR THE GRANT OF MOTIONS OF SUMMARY JUDGMENT.

A Motion for Summary Judgment places an affirmative burden on the moving party to demonstrate the absence of genuine issues of material fact and to show that he is entitled to judgment as a matter of law.[1]

For purposes of ruling on a Motion for Summary Judgment, all factual inferences are to be taken against the moving party and in favor of the opposing party, and a case is not suitable for summary judgment when there are undisputed facts from which different inferences might be drawn and as to which reasonable minds might differ.[2]

On a Motion for Summary Judgment, the Court must give the non-moving party the benefit of all reasonable inferences to be drawn from the facts. *Snell v. U.S.*, 680 F.2d 545 (1982); *Apcoa, Inc. v. Fidelity National Bank*, 906 F.2d 610 (11th Cir.1990). Where, as here, there are genuine issues of fact to be tried, summary judgment is not warranted.

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1. *Bell v. Cameron Meadows Land Company*, 669 F.2d 1278 (1982); *Howard v. BP Oil Company, Inc.*, 32 F.3d 520 (11th Cir. (1994); *Joiner v. General Electric Company*, 78 F.3d 524 (11th Cir. 1996).

2. *Sankovich v. Life Ins. Co. of North America*, 638 F.2d 136 (1981); *Griesel v. B. D. Hamlin*, 963 F.2d 338 (11th Cir. 1992); *Irby v. Bittick*, 44 F.3d 949 (11th Cir. 1995).

CONCLUSION

Based upon the above-stated facts and cited authority it is respectfully shown that genuine issues of material fact exist as to whether petitioner could perform the essential functions of her position as bartender and was therefore a "qualified individual with a disability" under the provisions of the ADA. As the record reflects there are undisputed facts from which a reasonable inference may be drawn that petitioner is able to perform all essential functions of the position of bartender as specified before and after she filed her complaint.

WHEREFORE, Petitioner respectfully requests that this Honorable Court reverse the judgment of the Court of Appeals for the Eleventh Circuit affirming the District Court's grant of respondents' Motion for Summary Judgment.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED DECEMBER 9, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-8157

D.C. Docket No-97-00070-5-CV-3-HL

FRANCES D. PEEPLES,

Plaintiff-Appellant,

versus

HOTEL MANAGEMENT, INC.,
Jointly and Severally, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Georgia

(December 9, 1999)

Before BIRCH and HULL, Circuit Judges, and HODGES*, Senior District Judge.

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* Honorable William Terrell Hodges, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

Appendix A

PER CURIAM: AFFIRMED. *See* 11th Cir. R. 36-1.[1]

"Costs taxed against the plaintiff-appellant."

Entered: December 9, 1999
For the Court: Thomas K. Kahn,
Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: FEB 22 2000

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1. 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) the judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole

(d) a summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) the judgment has been entered without a reversible error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, MACON DIVISION DATED AND FILED JANUARY 8, 1999

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

CIVIL ACTION
NO. 5:97-CV-70-3

FRANCES D. PEEPLES,

Plaintiff,

v.

WRIGHT INVESTMENT PROPERTIES, INC., HOTEL MANAGEMENT, INC., DRIVING FORCE, L.L.C., MACON, GA HOTEL PARTNERS, L.P., and STACEY PERRYMAN,

Defendants.

ORDER

Plaintiff has filed claims for violation of the Americans with Disabilities Act of 1990 ("ADA"), the Georgia Equal Employment for Persons with Disabilities Code ("GEEPDC") and intentional and negligent infliction of emotional distress. Before the Court is Defendants' Motion for Summary Judgment. For the reasons set forth herein, the Motion is **GRANTED** and the case **DISMISSED**.

Appendix B

FACTS

Defendant Macon, Georgia Hotel Partners, L.P. ("HP") owns a Holiday Inn located off the I-475 bypass in Macon. Defendant Hotel Management, Inc. ("HMI") manages the day-to-day operations of the Holiday Inn. Defendant Driving Force L.L.C. is the General Partner of HP and Defendant Wright Investment Properties, Inc. is a real estate development company. Defendant Stacy Perryman was formerly employed by HP as General Manager of the Holiday Inn during the relevant time period.

HP purchased the Holiday Inn in January 1996 and invested a substantial amount in improving the property. HP also hired a new management team and offered employment to the remainder of the hotel staff. Plaintiff Frances Peeples ("Peeples"), who had been employed as lounge manager by the previous owner, was hired as a bartender, subject to her completing a 90-day evaluation period.

Peeples began having problems with her vision as early as 1991. Despite surgery, she continues to have blurriness and blind spots in her vision. In April 1996, her vision was measured at 20/200 left eye and 20/400 right eye, making her legally blind in Georgia. She has lost peripheral vision, has difficulty seeing 20 feet away and has blockage for part of her vision. In November 1995, she applied for Social Security Administration ("SSA") benefits, stating that her visual impairment rendered her so "disabled" she was "unable to work." She received disability benefits the entire time she worked for HP.

Appendix B

Prior to its acquisition by HP, the Holiday Inn operated without a formal alcohol management policy. One of the first things HP did after it acquired the property was implement such a policy, the goal of which was to help the hotel avoid dram shop liability. As part of this plan, bartenders (including Peeples) were responsible for ensuring that minors were not served or otherwise drinking in the lounge, that licenses and other forms of personal identification were authentic, and that persons who were obviously intoxicated were not served.

A few weeks after Peeples was hired General Manager Perryman, informed by others that Peeples was suspected of drinking on the job, questioned her about it. Peeples denied the accusations and took an alcohol test, which turned out negative. In a subsequent meeting about the incident, Perryman questioned Peeples about her watery eyes, at which point Peeples explained her vision problems. She explained that she knew the buttons on the cash register and the alcohol bottles only by memory and that she could see numbers on credit cards with a magnifying glass, although she had difficulty ensuring they were not transposed.

In a meeting the next day, Perryman expressed her concerns about Peeples' ability to administer the Alcohol Management Program and with whether the hotel's insurance company would allow a legally blind bartender to serve liquor. She told Peeples that she would move her to work in the dining room as a banquet server, a position she assured would provide at least the same base pay and tips. The parties disagree as to how what happened next transpired, but Peeples ultimately refused the transfer and was terminated.

Appendix B

DISCUSSION

A. ADA claim

In order to establish a *prima facie* case of disability discrimination under the ADA, Plaintiff must prove each of the following elements: (1) she has a "disability," (2) she was "qualified" for the position in question, and (3) she was discriminated against because of her disability. *Witter v. Delta Air Lines, Inc.*, 138 F.3d 1366, 1369 (11th Cir. 1988). The facts of this case show that Plaintiff cannot meet the second element because she was not qualified for the position.

1. Qualified Individual With a Disability

"The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires." 42 U.S.C. § 12111(8). The facts of this case, including, Defendants' Alcohol Management Program ("AMP") and Plaintiff's own testimony, establish that Plaintiff was unable to perform the essential functions of her job and that no reasonable accommodation existed which would allow her to do so.

Plaintiff's 20/200 left eye and 20/400 right eye vision at the time of her employment made her legally blind in Georgia. In addition, there are parts of her vision where there is no line of sight, due to blockage from scar tissue. She also has difficulty seeing more than 20 feet away. Her impairment

is permanent and cannot be corrected through the use of surgery or visual aids.

There is no dispute that proper administration of the AMP was an essential function of the job in question. In order to properly administer the AMP, bartenders were required to monitor the lounge, which is more than 50 feet long, to prevent obviously intoxicated persons from continuing to drink. In addition, they were required to protect against underage drinking, which includes detecting fraudulent driver's licenses, as well as monitoring the lounge to prevent minors from sharing drinks with of-age patrons. Because there was only one bartender per shift, that person was the sole individual charged with enforcing the AMP.

Plaintiff steadfastly maintains that she could perform the essential functions of the job as she had done under previous ownership. She points to testimony from a vocational expert, Debra Horton, who Plaintiff retained to assess her abilities in relation to certain job tasks found in a bar setting. Ms. Horton tested Plaintiff's ability to tend bar in a simulated work setting. The test, which was administered in the bar of a local Best Western, was based on a description of general requirements for bartenders taken from a Georgia Department of Labor Handbook and included Plaintiff performing tasks such as setting up the bar, mixing drinks, making change, and reading birth dates on drivers' licenses. Ms. Horton reached her conclusions based on her observations while administering the tests, an interview with Ms. Peeples about her performance and her separation notice. Ms. Horton's assessment found that Plaintiff did not demonstrate a significant risk. However, a close review of

Appendix B

Ms. Horton's report and subsequent deposition reveals little evidence of any relevance, so far as this case is concerned. Significantly, Ms. Horton never reviewed the hotel's AMP. As a result, her tests and subsequent opinion did not include any analysis of Ms. Peeples' ability to perform certain tasks Defendants felt were essential to the job, e.g., detecting the level of intoxication of bar patrons, checking for *fake* drivers' licenses, and insuring that minors were not surreptitiously sharing drinks with of-age patrons (all of which necessarily involve subtle visual inspection). There is nothing in the record to suggest Ms. Peeples could adequately perform any of these tasks at the Holiday Inn bar (which appears to have been significantly larger than the Best Western bar at which Plaintiff was tested), nor is there anything to suggest that these tasks were not essential functions of the bartender position.

Perhaps most importantly, Ms. Peeples is not entitled to define the essential functions of the job. Simply because prior ownership may have had a less strict description of the essential functions of the job does not mean Defendants in this case were required to define the job in the same manner. It is also of no consequence that Ms. Peeples felt she could perform these tasks by providing her own reasonable accommodation — a magnifying glass. While this may have improved her near visual acuity for performing such tasks as reading the dates on licenses and the labels on liquor bottles, the Court can imagine no circumstance — and Ms. Peeples has suggested none — in which this would assist her in performing the previously listed distance vision related tasks for which she was never tested by Ms. Horton. Ms. Peeples has also not suggested any other accommodation

that would allow her to perform those job functions. This is because no such accommodation exists for correcting Ms. Peeples' permanent disability. While the Court is sympathetic to the plight of Ms. Peeples, the fact is that she is not qualified to perform the essential functions of the job, as defined by Defendants. Her ADA claim must therefore be **DISMISSED**, as well as her GEEPDC and emotional distress claims, which were proper before the Court only as pendant claims. Summary judgment is therefore **GRANTED** to Defendants.

SO ORDERED, this the 8 day of Jan, 1994.

s/ Hugh Lawson
HUGH LAWSON, JUDGE

Appendix B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

Case no. 5:97-CV-70-3(HL)

FRANCES PEEPLES,

Plaintiff,

v.

WRIGHT INVESTMENT PROPERTIES, INC., HOTEL MANAGEMENT, INC., DRIVING FORCE, L.L.C., MACON, GA HOTEL PARTNERS, L.P., and STACEY PERRYMAN,

Defendants.

JUDGMENT

The Court by Order dated and filed January 8, 1999, having granted Defendant's Motion for Summary Judgment,

JUDGMENT is hereby entered in favor of Defendants and against Plaintiff.

This 8th day of January, 1999.

GREGORY J. LEONARD,
CLERK

By: s/ Lee Ann Purvis
Lee-Ann Purvis, Deputy Clerk

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED FEBRUARY 9, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-8157

FRANCES D. PEEPLES,

Plaintiff-Appellant,

versus

HOTEL MANAGEMENT, INC.,
Jointly and Severally, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: BIRCH and HULL, Circuit Judges, and *HODGES, Senior District Judge.

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* Honorable William Terrell Hodges, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

Appendix C

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE